## PP v. SIM SAI HOON

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPLICATION NO: WA-44-126-06-2019]
26 APRIL 2020

***CRIMINAL LAW:*** *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 56(1) – Forfeiture of monies – Whether s. 56(2) provides for forfeiture of subject matter or evidence of offence of money laundering and not just any property – Whether monies seized were subject matter or evidence related to commission of offence of money laundering – Whether proceeds of unlawful activity had been spent before issuance of freezing order – Whether monies ought to be returned – Malaysian Anti-Corruption Commission Act 2009, s. 23(1)*

The Malaysian Anti-Corruption Commission ('MACC') received information that the former Prime Minister, Dato' Sri Mohd Najib bin Abdul Razak ('DSNR') had used his position as the Chairman of the Board of Advisors for 1Malaysia Development Bhd ('1MDB') and as the Minister of Finance, Malaysia, for gratification for the amount of RM3.217 billion. The gratification was remitted into his personal account at AmPrivate Banking AmBank (M) Bhd for his personal interests. Based on that information, MACC Superintendent Nur Aida Arifin lodged a report with the MACC. In the present application, the Public Prosecutor sought an order under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') to forfeit the sum of RM41,261.64 and all of its accruals in the respondent's Current Account No. 21427700032720 at the RHB Bank Bhd ('RHB account'). The Public Prosecutor also applied for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette* to call on any third parties claiming to have an interest in the money to appear before this court on the specified date to show cause as to why the money should not be forfeited.

**Held (dismissing application):**

**(1)** The application for forfeiture may be made by the Public Prosecutor only in respect of properties falling within any of the categories specified in paras. (a) to (d) of s. 56(1) of the AMLATFPUAA. There was no prosecution or conviction under s. 4(1) of the AMLATFPUAA or of a terrorism financing offence in respect of the seized properties. The third party notice was published in the *Gazette* pursuant to s. 61(2) of the AMLATFPUAA and there were no claims made by any third party.

Pursuant to s. 56(1) of the AMLATFPUAA, an application for an order of forfeiture may be made within 12 months from the date of seizure or where there is a freezing order, within 12 months from the date of the freezing. The applicant issued a freezing order dated 25 June 2018 against the respondent's RHB account whereas the application was filed on 19 June 2019, thus the application was within the time prescribed by s. 56(1) of the AMLATFPUAA. (paras 22-25)

**(2)** The standard of proof to be applied in an application for an order of forfeiture of property under s. 56(1) of the AMLATFPUAA and of any question of fact to be decided in proceedings under the AMLATFPUAA shall be on the balance of probabilities. The applicant's case was that the predicate offence in the application which was the constituent to the offence of money laundering was one of using office or position for gratification under s. 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act'). There was no prosecution for an offence under s. 23(1) of the MACC Act but it must be determined on the facts whether the predicate offence of using office or position for gratification had been committed. At the material time, DSNR was an officer of a public body as defined under s. 3 of the MACC Act. He was the Prime Minister and the Minister of Finance and did receive monies in the first account and second account, respectively. Receipt of the monies in DSNR's first account and second account was sufficient to attract the application of the rebuttable presumption under s. 50(1) of the MACC Act, namely that the gratification had been corruptly received. (paras 30, 32 & 37-39)

**(3)** The applicant had proven, on the balance of probabilities, that a predicate offence under s. 23(1) of the MACC Act had been committed. The decisions made and actions taken by DSNR in relation to the affairs of 1MDB and the consequent transfers of monies into his first account and second account in numerous transactions spoke volume of this fact. The fact that he had an interest in all the decisions he made and actions he took were bolstered in the manner the events transpired and the consequent transfer of monies. The fact that it was DSNR as the then Prime Minister who was empowered under art. 117 of the memorandum and articles of association of 1MDB to make any decision relating to the financial management and investment of 1MDB further attested to the fact that all the impugned decisions and actions pertaining to the investments and business ventures had in fact been so made by him. By contrast, the respondent in his affidavit in reply, did not specifically

make any averments to refute the predicate offence and therefore, the applicant's averments of that facts were deemed admitted by the respondent. (paras 42 & 43)

**(4)** In determining whether the applicant had succeeded in proving that the property seized from the respondent was the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA, an analysis of the relationship between the definitions of 'unlawful activity', 'proceeds of an unlawful activity' and 'serious offence' under s. 3 of the AMLATFPUAA is inevitable. The offence of using office or position for gratification under s. 23(1) of the MACC Act falls under the category of 'serious offence' as it is specified in the Second Schedule of the AMLATFPUAA. Being a serious offence, the offence of using office or position for gratification under s. 23(1) of the MACC Act is an 'unlawful activity'. Any property which is wholly or partly derived or obtained from the unlawful activity becomes 'proceeds of an unlawful activity' and the act of engaging in a transaction which involves the proceeds of an unlawful activity is an offence of money laundering under s. 4(1)(a) of the Act. (paras 45 & 46)

**(5)** The respondent had received, in his RHB account, the sum of RM1,200,000 *vide* AmIslamic Bank Bhd Cheque No. 571664 dated 3 December 2012. The cheque was made payable to 'Sim Sai Hoon', the respondent, and was issued from the first account of DSNR. The monies in DSNR's first account, either wholly or partly, were proceeds of the offence of using office or position for gratification under s. 23(1) of the MACC Act as there were ample evidence to show their remittances. DSNR's first account thus consisted of 'proceeds of an unlawful activity' as defined under s. 3 of the AMLATFPUAA. (paras 47 & 48)

**(6)** As of 5 July 2016, the respondent's RHB account showed a negative balance of RM21,461.26 and the freezing order was only issued on 25 June 2018. In other words, the sum of RM1,200,000 from the first account of DSNR which found its way into the respondent's RHB account had been totally spent at the time when the applicant issued the freezing order and seized the respondent's RHB account. Hence, the relevant subject matter or evidence relating to the commission of an offence under s. 4(1)(a) of the AMLATFPUAA was no longer in the bank account of the respondent, either wholly or partly. As such, it could not be the subject of a forfeiture application and this court could not order for its forfeiture. The aim of s. 56(2) of the AMLATFPUAA

A is to forfeit the subject matter or evidence of the offence of money laundering and not just any property. Therefore, all the monies in the respondent's RHB account was ordered to be returned to the respondent. (paras 50, 52, 53 & 55)

**Case(s) referred to:**

B *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC* ***(refd)***

*Arab-Malaysian Credit Bhd v. Dominance Resources Sdn Bhd & Anor [2001] 2 CLJ 268 HC* ***(refd)***

*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA* ***(refd)***

*PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC* ***(refd)***

C *PP v. Kuala Dimensi Sdn Bhd & Ors [2019] 3 CLJ 650 CA* ***(refd)***

*PP lwn. Taiko Fertiliser & Yang Lain [2019] 4 CLJ 480 CA* ***(foll)***

*Siti Aishah Sheikh Abd Kadir v. PP [2014] 1 CLJ 1058 CA* ***(refd)***

*The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC* ***(refd)***

D **Legislation referred to:**

Anti-Corruption Act 1997 (repealed), s. 15(1), (2)

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 3, 4(1)(a), 56(1)(a), (b), (c), (d), (2)(a)(i), (ii), (iii), (iv), (b), (4), 61(2), 70

Malaysian Anti-Corruption Commission Act 2009, ss. 3, 23(1), (2), 50(1), Second E Schedule

*For the applicant - Mahadi Abdul Jumaat; DPP*
*For the respondent - Cheow Wee & Ong Chia Wai; M/s Cheow Wee & Mai*

*Reported by S Barathi*

F **JUDGMENT**

**Ahmad Shahrir Mohd Salleh JC:**

**Introduction**

**[1]** This is an application dated 18 June 2019 (encl. 1) under s. 56(1) of G the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA") to forfeit from the respondent the sum of RM41,261.64 and all accrued interest held in the respondent's RHB Bank Bhd Current Account No. 21427700032720 to the Government. A freezing order dated 25 June 2018 was issued against the H respondent's RHB Bank Bhd account and the account was seized on 21 September 2018.

**[2]** On 3 September 2019, this court allowed for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette*. The third party notice has been published in the *Gazette vide* PU(B) 20040/2019 (exh. P1). No third I party has come forward to stake any claim.

## Brief Background Facts

*The Information*

**[3]** The Malaysian Anti-Corruption Commission ("MACC") received information that the former Prime Minister, Dato' Sri Mohd Najib bin Abdul Razak ("DSNR") had used his position as the Chairman of the Board of Advisors for 1Malaysia Development Bhd ("1MDB") and as the Minister of Finance, Malaysia, for gratification for the amount of RM3.217 billion. The gratification was remitted into his personal account at AmPrivate Banking AmBank (M) Bhd for his personal interests. Based on that information, MACC Superintendent Nur Aida binti Arifin lodged a report with the MACC *vide* Report No. 0203/2018.

*1MDB*

**[4]** 1MDB is a sovereign wealth fund which has been rebranded pursuant to a take-over of the Terengganu Investment Authority ("TIA") through shares transfer from the Terengganu State Government to the Ministry of Finance. On 4 September 2009, TIA was officially rebranded as 1MDB and owned by the Federal Government through the Minister of Finance (Incorporated) "("MoF Inc."). 1MDB came directly under the purview of DSNR as the Minister of Finance. Additionally, DSNR was also the Chairman of the Board of Advisors for 1MDB. As the Minister of Finance and the Chairman of the Board of Advisors, DSNR had full and absolute powers to make decisions pertaining to all matters relating to 1MDB including investments and business ventures. These powers override decisions which may be made by the Board of Directors and senior managements of 1MDB.

*Investments And Business Ventures*

**[5]** Under the direction and stewardship of DSNR, 1MDB entered into various business ventures as follows:

(i) 1MDB-PetroSaudi in a joint venture with PetroSaudi International Ltd of the Saudi Arabia,

(ii) a joint venture with Aabar Investment PJS ("Aabar"),

(iii) the acquisition of power producers, Tanjong Energy Holdings Sdn Bhd ("Tanjong Energy") and Mastika Lagenda Sdn Bhd ("Mastika Lagenda").

The investments and business ventures resulted in the following events:

The 1MDB-Petrosaudi In A Joint Venture With PetroSaudi International Ltd Of The Saudi Arabia

**[6]** Pursuant to the approval of the Board of 1MDB and the Central Bank of Malaysia, the sum of USD1 billion was to be paid into the account of 1MDB-PetroSaudi at JP Morgan (Suisse) SA. However, the following events had transpired:

(i) on 30 September 2009, 1MDB only transferred USD300 million into the account of 1MDB-PetroSaudi at JP Morgan (Suisse) SA and the balance sum of USD700 million was instead transferred into the account one Good Star Limited ("Good Star") at the RBS Coutts Bank Ltd, Switzerland. Good Star is owned by one Low Taek Jho ("Jho Low") and he is also the authorised signatory for Good Star's account at RBS Coutts Bank Ltd, Switzerland;

(ii) on 16 May 2011, DSNR and 1MDB approved an additional loan of RM1 billion (equivalent to USD330 million) to 1MDB-PetroSaudi through the subscription of "murabaha notes" in exchange of a 40% equity for 1MDB in 1MDB-PetroSaudi;

(iii) between 20 May 2011 and 25 October 2011, a total of USD330 million in four transactions was transferred to Good Star's account at RBS Coutts Bank Ltd;

(iv) between 18 February 2011 and 10 June 2011, the sums of USD12.5 million and USD12 million were transferred from Good Star's account to the joint account of Prince Faisal bin Turki Al-Saud and Prince Saud bin Abdulaziz Al-Saud at the Riyad Bank, Riyadh, Saudi Arabia ("Riyad Bank account");

(v) on 24 February 2011, the sum of USD10 million (equivalent to RM30,449,929.97) was transferred from the Riyad Bank account into the account of DSNR at AmPrivate Banking Account No. 2112022009694 ("first account"); and

(vi) on 14 June 2011, the sum of USD10 million (equivalent to RM30,179,909.46) was transferred from the Riyad Bank account into the first account.

The Joint Venture With Aabar

**[7]** The joint venture with Aabar was named Abu Dhabi Malaysia Investment Company ("ADMIC"). Pursuant to the joint venture agreement, each party are required to make a capital injection of USD3 billion into ADMIC. For this purpose, 1MDB incorporated 1MDB Global Investment Ltd ("1MDB GIL") to issue international bonds for USD3 billion with a letter of support from the Government of Malaysia. Issuance of the bonds were arranged by Goldman Sachs International ("Goldman Sachs"). 1MDB GIL opened an account at the BSI Bank in Lugano, Switzerland ("BSI Bank") and later, 1MDB issued the international bonds for USD3 billion. However, after issuance of the bonds there was no capital injection into ADMIC made by Aabar. The joint venture too did not kick-off and was not operational.

**[8]** Pursuant to the issuance of the bonds, 1MDB GIL received the total of USD2,721,000,000 in its account at the BSI Bank. None of this money was used for the purposes of the approved joint venture. Instead, 1MDB GIL made a number of transactions for investment purposes to the following entities:

(i) Cistenique Investment Fund;

(ii) Enterprise Emerging Market Fund;

(iii) Devonshire Capitol Growth Fund;

(iv) Tanore Finance Corporation ("Tanore"); and

(v) Granton Property Holding Ltd.

**[9]** Between 22 March 2013 and 10 April 2013, DSNR received transfers from Tanore for the total sum of RM2,081,476,926 in the first account through nine transactions.

The Acquisition Of Power Producers, Tanjong Energy Holdings Sdn Bhd And Mastika Lagenda Sdn Bhd

**[10]** The acquisition of Tanjong Energy for RM10.6 billion was approved by DSNR. It was done through a special purpose vehicle ("SPV"), 1MDB Energy Ltd ("1MEL"), a wholly-owned subsidiary of 1MDB. After factoring in the debts, Tanjong Energy was eventually acquired at RM8.5 billion. In order to finance the acquisition and its completion, the Board of Directors of 1MDB proposed for a fund-raising exercise and appointed Goldman Sachs as the bookrunner and arranger.

**[11]** Goldman Sachs proposed for the acquisition to be financed through:

(i) a bridging loan facility in the sum of RM6.17 billion jointly from Maybank Bhd and RHB Bank Bhd, and;

(ii) the issuance of USD bonds for the amount of USD1.75 billion through 1MDB Labuan with a coupon rate of 5.99% per annum redeemable in the year 2022.

**[12]** According to the offering circular for the issuance of the bonds, the net proceeds after deducting the fees of Goldman Sachs, commission and expenses, shall be partly used to finance the acquisition of Tanjong Energy and partly for general corporate purposes of 1MEL, the SPV. The USD bonds are jointly guaranteed by 1MDB and International Petroleum Investment Company PJSC ("IPIC") to enable 1MDB to obtain a higher credit rating and take advantage of a more lucrative coupon rate for the bonds. For the purposes of the joint guarantee, the MoF Inc agreed to guarantee the repayment to IPIC of any amounts payable under the bonds.

**[13]** DSNR approved the acquisition of Mastika Lagenda for RM2.75 billion. It was done through a SPV, 1MDB Energy (Langat) Ltd ("1MELL"), a wholly-owned subsidiary of 1MDB. 1MDB entered into an agreement to acquire the power asset of Genting Sanyen Power Sdn Bhd at RM2.75 billion and pursuant to the private placement memorandum, 1MDB will issue guaranteed notes in the sum of USD1.75 billion by private placement with Goldman Sachs with a coupon rate of 5.75% per annum redeemable in the year 2022. According to the private placement memorandum, the net proceeds from the guaranteed notes after deducting the fees of Goldman Sachs, commission and expenses, shall be partly used to finance the acquisition of Mastika Lagenda and partly for general corporate purposes.

**[14]** For the acquisition of these two power producers, 1MDB through its wholly-owned subsidiaries, 1MEL and 1MELL, has issued bonds to the tune of USD3.5 billion. From these business ventures, the following transactions had taken place:

(i) on 22 May 2012, the sum of USD576,943,490 was transferred from the account of 1MEL at Falcon Private Bank Ltd, Hong Kong ("Falcon Bank") to the account of Aabar Investment PJS Ltd ("Aabar BVI") at BSI AG, Lugano, Switzerland ("BSI Bank");

(ii) on 19 October 2012, the sum of USD790,354,855 was transferred from the account of 1MELL at Falcon Bank to Aabar BVI's account at BSI Bank,

(iii) between 25 May 2012 and 14 December 2012, Aabar BVI transferred the total sum of USD637 million from its BSI Bank to the account of Blackstone Asia Real Estate Partners at the Standard Chartered Bank, Singapore under the name of one Tan Kim Loong ("Blackstone Standard Chartered account"),

(iv) on 31 October 2012, DSNR received from Blackstone Standard Chartered account the sum of USD5 million (equivalent to RM15,149,963.64) in the first account,

(v) on 20 November 2012, DSNR received from Blackstone Standard Chartered account the sum of USD25 million (equivalent to RM60,599,963.64) in the first account.

*Loans From Deutsche Bank AG*

**[15]** In the year 2014, 1MDB planned to carry out an initial public offering ("IPO") of 1MDB Energy Group in Bursa Malaysia to redeem the 49% equity of Aabar ("Aabar options") in each 1MEL and 1MELL during the acquisition phase of the two power producers. The redemption exercise is known as a buy-back option and was made through 1MDB Energy Holdings Ltd ("1MEHL"), a subsidiary of 1MDB. For this purpose, DSNR and the Board of Directors of 1MDB agreed to terminate the Aabar options and the bridge loan facility made by 1MDB Energy Holdings Ltd from Deutsche Bank AG amounting to not more than USD300,000,000 so that the IPO could proceed as planned.

**[16]** On 28 May 2014, 1MEHL made a loan of USD250 million from Deutsche Bank AG and eventually received USD239,939,970. That money was remitted into the account of 1MDB Energy Holdings Ltd at Falcon Bank. On 1 September 2014, 1MEHL made another loan of USD975,000,000 from Deutsche Bank AG to repay the earlier USD250 million loan and to cover the shortfall in payment for the termination of the Aabar options. After receiving the money from 1MEHL, Aabar made a number of money transfers to Affinity Equity International Partners Ltd and Vista Equity International Partners Ltd.

**[17]** Between June and December 2014, DSNR received the total sum of RM49,930,985.70 in his account at AmPrivate Banking Account No. 2112022011880 ("second account").

*The Money Received By DSNR In His Account*

**[18]** In summary, DSNR received the following monies in his account, chronologically:

(i) the sum of USD10 million (equivalent to RM30,449,929.97) in the first account on 24 February 2011;

(ii) the sum of USD10 million (equivalent to RM30,179,909.46) in the first account on 14 June 2011;

(iii) the sum of USD5 million (equivalent to RM15,149,963.64) in the first account on 31 October 2012;

(iv) the sum of USD25 million (equivalent to RM60,599,963.64) in the first account on 20 November 2012;

(v) the total sum of RM2,081,476,926 in the first account between 22 March 2013 and 10 April 2013; and

(vi) the total sum of RM49,930,985.70 in the second account between June and December 2014.

**Subject Matter Of The Application**

**[19]** In the present application, the Public Prosecutor seeks for an order to forfeit the sum of RM41,261.64 and all of its accruals in the respondent's Current Account No. 21427700032720 at the RHB Bank Bhd, Salak South branch, Kuala Lumpur. The Public Prosecutor also applies for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette* to call on any third parties claiming to have an interest in the money to appear before this court on the specified date to show cause as to why the money should not be forfeited.

**The Affidavits**

**[20]** The affidavits filed for and against the application are as follows:

(i) "afidavit sokongan" affirmed on 18 June 2019 by Allan Suman Pillai (encl. 2) for and on behalf of the applicant;

(ii) "afidavit" affirmed on 18 June 2019 by Nur Aida binti Arifin (encl. 3) for and on behalf of the applicant;

(iii) "afidavit" affirmed on 18 June 2019 by Muhammad Syazari Arif bin Nordin (encl. 6) for and on behalf of the applicant;

(iv) "afidavit jawapan responden" affirmed on 15 August 2019 by Sim Sai Hoon (encl. 9), the respondent; and

(v) "afidavit balasan" affirmed on 29 August 2019 by Muhammad Syazari Arif bin Nordin (encl. 11) for and on behalf of the applicant.

**Analysis And Findings**

**[21]** Section 56 of the AMLATFPUAA deals with forfeiture of property in cases where there is no prosecution or conviction for a money laundering offence or a terrorism financing offence. Under s. 56(1) of the AMLATFPUAA, an application for the forfeiture of properties seized under the Act may be made by the Public Prosecutor before the expiration of 12 months from the date of the seizure. The application is subject to s. 61 of the

AMLATFPUAA and in that regard, the requirement under s. 61(2) for a notice to be published in the *Gazette* calling for any third party who claims to have an interest in the property to show cause why the property should not be forfeited must first be satisfied see *PP lwn. Taiko Fertiliser & Yang Lain* [2019] 4 CLJ 480 CA; [2019] MLJU 88; [2019] MLRAU 36).

**[22]** The application for forfeiture may be made by the Public Prosecutor only in respect of properties falling within any of the categories specified in paras. (a) to (d) of s. 56(1). Section 56(1) of the AMLATFPUAA provides as follows:

> **Forfeiture of property where there is no prosecution**
>
> 56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.

It is thus pertinent to firstly consider whether the application complies with the requirements of s. 56(1) of the AMLATFPUAA.

*Whether There Is A Prosecution Or Conviction For An Offence Under Sub-section 4(1) Or A Terrorism Financing Offence*

**[23]** It is not disputed that there is no prosecution or conviction under s. 4(1) of the AMLATFPUAA or of a terrorism financing offence in respect of the seized properties. In his affidavit (encl. 2) at para. 9, the DPP too confirmed that the Public Prosecutor decided not to proceed with any prosecution under s. 4(1) of the AMLATFPUAA. In this context, I find that the condition under s. 56(1) of the AMLATFPUAA in this regard has been fulfilled.

*Publication Of Third Party Notice In The Gazette*

**[24]** Despite objections from learned counsel for the respondent, on 3 September 2019, this court allowed for a notice under s. 61(2) of the AMLATFPUAA to be published in the *Gazette*. This is premised on the fact that s. 56(1) of the AMLATFPUAA specifically made the application subject to s. 61 AMLATFPUAA and s. 61(2) of the AMLATFPUAA makes it

mandatory for the notice to be published in the *Gazette*. This position of the law is reiterated in *PP lwn. Taiko Fertiliser & Yang Lain* (*supra*) and this court is bound to loyally follow that decision on the basis of the doctrine of *stare decisis* (see *The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 FC; [1997] 2 MLJ 829; [1997] 1 MLRA 318; [1997] 4 AMR 3784; and *Arab-Malaysian Credit Bhd v. Dominance Resources Sdn Bhd & Anor* [2001] 2 CLJ 268; [2001] MLJU 67; [2001] MLRH 92). On 3 September 2019, the third party notice was published in the *Gazette vide* PU(B) 20040/2019. This requirement has thus been fulfilled. There are no claims made by any third party.

*Whether The Application Is Made Within The Period Fixed By Section 56(1) Of The AMLATFPUAA*

**[25]** Pursuant to s. 56(1) of the AMLATFPUAA, an application for an order of forfeiture may be made within 12 months from the date of seizure or where there is a freezing order, within 12 months from the date of the freezing. In the present application, the applicant issued a freezing order dated 25 June 2018 against the respondent's RHB Bank Bhd account whereas the application was filed on 19 June 2019. The application is thus made within the time prescribed by s. 56(1) of the AMLATFPUAA, namely before expiry of the period of 12 months from the date of the freezing order. To this end, I find that the application has been made within the prescribed period under s. 56(1) of the AMLATFPUAA.

**[26]** I shall now examine whether the applicant has satisfied the necessary requirements to have the seized property forfeited. Under s. 56 of the AMLATFPUAA, the classifications of the properties for which an application under sub-s. (1) may be made by the Public Prosecutor and the classifications of properties for which an order of forfeiture under sub-s. (2) may be made by the court are the same.

*Whether The Applicant Has Satisfied The Necessary Conditions For The Property To Be Forfeited*

**[27]** The crux of the applicant's case is that the property seized from the respondent is the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA. In considering an application under s. 56(1) of the AMLATFPUAA, it is the duty of this court under sub-s. (2) to consider whether the applicant has provided sufficient evidence to show that the seized property falls under any of the disjunctive categories provided for under sub-paras. (i) to (iv) of s. 56(2)(a) and that there is no purchaser in good faith for valuable consideration in respect of the properties pursuant to s. 56(2)(b) of the AMLATFPUAA. Section 56(2) of the AMLATFPUAA provides as follows:

**Forfeiture of property where there is no prosecution**

56(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is:

(i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) the proceeds of an unlawful activity; or

(iv) the instrumentalities of an offence; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

**[28]** In respect of this part of the issue, I shall address it by dividing the answers as follows:

(i) the standard of proof;

(ii) the predicate offence;

(iii) the money laundering offence and whether the seized property is the subject matter or evidence relating to the commission of the offence of money laundering; and

(iv) whether there is any purchaser in good faith for valuable consideration in respect of the seized property.

The Standard Of Proof

**[29]** In determining whether the seized property relates to the offence of money laundering or terrorism financing and of any question of fact in proceedings under the AMLATFPUAA, the same standard of proof applies, namely on the balance of probabilities. The same standard of proof however does not apply in a prosecution for an offence under the AMLATFPUAA. This is provided for under ss. 56(4) and 70 of the AMLATFPUAA, respectively. Section 56(4) of the AMLATFPUAA provides as follows:

**Forfeiture of property where there is no prosecution**

56(4) In determining whether the property is:

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

Section 70 of the AMLATFPUAA reads as follows:

> **Standard of proof**
>
> 70 (1) Any question of fact to be decided by a court in proceedings under this Act shall be decided on the balance of probabilities.
>
> (2) Subsection (1) shall not apply in relation to any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act or any subsidiary legislation under it.

**[30]** The Federal Court in *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305 FC; [2018] 2 MLJ 401; [2018] 1 MLRA 357; [2017] 8 AMR 533 reiterated this position and observed that the standard of proof to be applied in an application for an order of forfeiture of property under s. 56(1) of the AMLATFPUAA and of any question of fact to be decided in proceedings under the AMLATFPUAA shall be on the balance of probabilities.

**[31]** In deciding whether or not the applicant succeeded in proving its case on the balance of probabilities, this court will consider, based on the affidavit evidence, how likely are certain facts which form the basis for the applicant's application. If after weighing the evidence the court believes that such facts point to probabilities which by reasonable conclusion supports the applicant's contention and are probable in light of the circumstances of the case in its entirety, the applicant is said to have succeeded in establishing its case on the balance of probabilities. On the other hand, if the facts as proved by the evidence led by the applicant give rise to a set of inferences from which the degree of probabilities in favour of the applicant and the respondent's case are equal, the applicant, who bears the burden to prove its case on the balance of probabilities, must fail.

The Predicate Offence

**[32]** It is the applicant's case that the predicate offence in the present application which is the constituent of the offence of money laundering is one of using office or position for gratification under s. 23(1) of the MACC Act 2009. Section 23(1) of the MACC Act 2009 is substantially similar to s. 15(1) of the Anti-Corruption Act 1997 ("ACA Act 1997"). Section 23(1) of the MACC Act 2009 provides as follows:

> **Offence of using office or position for gratification**
>
> 23(1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

**[33]** The ingredients of the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 are as follows:

(i) the accused is officer of a public body; and

(ii) the accused uses his office or position for any gratification, whether for himself, his relative or associate.

**[34]** In determining whether an offence under s. 23(1) of the MACC Act 2009 has been committed, two rebuttable presumptions are applicable. Firstly, is the presumption of using office or position for gratification under s. 23(2) and secondly, is the presumption under s. 50(1) that the gratification of the MACC Act 2009 received has been corruptly received. Section 23(2) of the MACC Act 2009 is substantially similar to s. 15(2) of the ACA Act 1997 and s. 50(1) of the MACC Act 2009 is substantially similar to s. 42(1) of the ACA Act 1997. Section 23(2) of the MACC Act 2009 reads as follows:

> **Offence of using office or position for gratification**
>
> 23(2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

Section 50(1) of the MACC Act 2009 reads as follows:

> **Presumption in certain offences**
>
> 50(1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

**[35]** Since s. 23(1) relates to the gratification offence committed by an officer of a public body, the definitions of "officer of a public body" and "gratification" under s. 3 of the MACC Act 2009 must also be considered. The respective definitions of "officer of a public body" and "gratification" under s. 3 of the MACC Act 2009 are as follows:

**Interpretation**

3. In this Act, unless the context otherwise requires:

...

"officer of a public body" means any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such;

...

"gratification" means:

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;

(b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f).

**[36]** In analysing the relationship between the section which creates the offence and the section which provides for the application of the rebuttable presumptions, it is clear that the rebuttable presumptions will apply once there is evidence to show that the conditions for the application of the rebuttable presumptions have been fulfilled see *Siti Aishah Sheikh Abd Kadir v. PP* [2014] 1 CLJ 1058 CA; [2013] 6 MLJ 86; [2014] 1 MLRA 496; [2013] 4 AMR 834).

**[37]** There is no prosecution for an offence under s. 23(1) of the MACC Act 2009 but it must be determined on the facts whether the predicate offence of using office or position for gratification has been committed. For that matter, the standard of proof on the balance of probabilities applies.

**[38]** The fact that at the material time DSNR was an officer of a public body as defined under s. 3 of the MACC Act 2009 is not in dispute. He was the Prime Minister and the Minister of Finance. DSNR did receive monies in the first account and second account, respectively. Chronologically, the transactions are as follows:

(i) the sum of USD10 million (equivalent to RM30,449,929.97) in the first account on 24 February 2011 (exh. "NAA9" in encl. 3),

(ii) the sum of USD10 million (equivalent to RM30,179,909.46) in the first account on 14 June 2011 (exh. "NAA9" in encl. 3),

(iii) the sum of USD5 million (equivalent to RM15,149,963.64) in the first account on 31 October 2012 (exh. "NAA14" in encl. 3),

(iv) the sum of USD25 million (equivalent to RM60,599,963.64) in the first account on 20 November 2012 (exh. "NAA14" in encl. 3),

(v) the total sum of RM2,081,476,926 in the first account between 22 March 2013 and 10 April 2013 (exh. "NAA17" in encl. 3), and

(vi) the total sum of RM49,930,985.70 in the second account between June 2014 and December 2014 (exh. "NAA20" in encl. 3).

**[39]** Receipt of the monies in DSNR's first account and second account is sufficient to attract the application of the rebuttable presumption under s. 50(1) of the MACC Act 2009, namely that that the gratification has been corruptly received. Thus, the question which remains to be answered in order to attract the application of the rebuttable presumption under s. 23(2) of the MACC Act 2009 is whether DSNR did make any decision or take any action in relation to the affairs of 1MDB which he has an interest, either directly or indirectly. In order to determine this fact, one needs to consider the affidavit of the IO predicate.

**[40]** It is averred by the IO predicate in her affidavit (encl. 3) that DSNR had a hand in all decisions and actions pertaining to investments and business ventures of 1MDB and that these decisions saw the pilfering of monies in a number of transactions which made their way into DSNR's first account and second account. This was made possible since the memorandum and articles of association of 1MDB (exh. "NAA2" in encl. 3) provide for the absolute exercise of powers by DSNR as the Prime Minister (then) in the following situations:

A (i) under article 68, the appointment and termination of directors may only be made with the prior written approval of the Prime Minister,

(ii) under article 93, all members of the Board of Advisors shall be appointed by the Prime Minister and the Prime Minister shall be the chairman of the board of advisors,

B

(iii) under article 117, any decision relating to the financial management and investment of 1MDB which involves the interest of nation shall be decided by the Prime Minister. Article 117 also provides that the appointment and termination of the directors and members of the senior management may only be made with the prior written approval of the Prime Minister.

C

The relevant decisions and actions which are averred to in the affidavit of the IO predicate are as follows:

(i) the joint venture between 1MDB and PetroSaudi International Ltd of the Saudi Arabia designated as 1MDB-PetroSaudi was made on the instructions of DSNR on 26 September 2009 (para. 9 of encl. 3),

D

(ii) the acquisition of Tanjong Energy for RM10.6 billion was approved by DSNR *vide* two resolutions both dated 9 February 2012. One was signed in his capacity as the Minister of Finance and the other as the holder of all special rights redeemable preference shares of 1MDB (exh. "NAA10" in encl. 3),

E

(iii) the acquisition of Mastika Lagenda for RM2.75 billion was approved by DSNR *vide* two resolutions both dated 10 August 2012. One was signed in his capacity as the Minister of Finance and the other as the holder of all special rights redeemable preference shares of 1MDB (exh. "NAA12" in encl. 3),

F

(iv) the joint venture with Aabar designated as Abu Dhabi Malaysia Investment Company (ADMIC) was approved by the Board of Directors of 1MDB *vide* the directors' circular resolution dated 25 February 2013 and DSNR *vide* a resolution in his capacity as the holder of all special rights redeemable preference shares of 1MDB (exh. "NAA15" in encl. 3), and

G

(v) the termination of the Aabar options and the bridge loan facility made by 1MDB Energy Holdings Ltd from Deutsche Bank AG pursuant to the planned IPO of 1MDB Energy Group in Bursa Malaysia was approved by DSNR and the Board of Directors of 1MDB *vide* the directors' circular resolution dated 22 May 2014 (exh. "NAA18" in encl. 3).

H

I

**[41]** In her affidavit, the I.O. Predicate avers that pursuant to her investigations and based on the contemporaneous documentary evidence, she is satisfied that as the then Prime Minister, the Minister of Finance and Chairman of the Board of Advisors for 1MDB, DSNR has committed an offence under s. 23(1) of the MACC Act 2009, namely in using his office and position for gratification, that is, the receipt of monies into his first account and second account. The averments made by the IO predicate in her affidavit are premised on sufficient information and relevant documents and this court ought to accord it proper weight see *PP v. Awalluddin Sham Bokhari* (*supra*)). On the same note, it is also observed that there is sufficient evidence to enable the presumption of use of office or position for gratification under s. 23(2) of the MACC Act 2009 to be applied.

**[42]** In analysing the affidavit of the IO predicate, I find that the applicant has succeeded, on the balance of probabilities, in proving that a predicate offence under s. 23(1) of the MACC Act 2009 has been committed. The decisions made and actions taken by DSNR in relation to the affairs of 1MDB and the consequent transfers of monies into his first account and second account in numerous transactions speak volume of this fact. The fact that he has an interest in all the decisions he made and actions he took are bolstered in the manner the events transpired and the consequent transfer of monies. The fact that it was DSNR as the then Prime Minister who was empowered under article 117 of the memorandum and articles of association of 1MDB to make any decision relating to the financial management and investment of 1MDB further attests to the fact that all the impugned decisions and actions pertaining to the investments and business ventures had in fact been so made by him.

**[43]** By contrast, the respondent in his affidavit in reply, did not specifically make any averments to refute the predicate offence and in that instance, this court is entitled to find that the applicant's averments of that facts are deemed admitted by the respondent see *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC; [1986] 1 MLJ 382; [1985] 1 MLRA 309; and *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA; [1995] 1 MLJ 281; [1995] 1 MLRA 48; [1995] 1 AMR 622).

A The Offence Of Money Laundering And Whether The Property Seized Is The Subject Matter Or Evidence Relating To The Commission Of The Offence Of Money Laundering

**[44]** In its application, the applicant takes the position that the seized property falls within para. (a) of s. 56(1) of the AMLATFPUAA, namely, B that it is the subject matter or evidence relating to the commission of an offence under s. 4(1)(a) of the AMLATFPUAA. The offence under s. 4(1)(a) of the AMLATFPUAA is one of money laundering.

Section 4(1)(a) of the AMLATFPUAA provides as follows:

C **Offence of money laundering**

4(1) Any person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence; ... .

D

**[45]** In determining whether the applicant has succeeded in proving that the property seized from the respondent is the subject matter or evidence relating to the commission of the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA, an analysis of the relationship between the definitions of "unlawful activity", "proceeds of an unlawful activity" and "serious E offence" under s. 3 of the AMLATFPUAA is inevitable. For ease of reference, s. 3 of the AMLATFPUAA defines "unlawful activity", "proceeds of an unlawful activity" and "serious offence", respectively, as follows:

F **Interpretation**

3(1) In this Act, unless the context otherwise requires:

...

"unlawful activity" means:

G (a) any activity which constitutes any serious offence or any foreign serious offence; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,

H regardless whether such activity, wholly or partly, takes place within or outside Malaysia;

...

"proceeds of an unlawful activity" means any property, or any economic advantage or economic gain from such property, within or outside I Malaysia:

(a) which is wholly or partly:

(i) derived or obtained, directly or indirectly, by any person from any unlawful activity;

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii);

...

"serious offence" means:

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences;

**[46]** The offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 falls under the category of "serious offence" as it is specified in the Second Schedule of the MACC Act 2009. Being a serious offence, the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 is an "unlawful activity". Any property which is wholly or partly derived or obtained from the unlawful activity becomes "proceeds of an unlawful activity" and the act of engaging in a transaction which involves the proceeds of an unlawful activity is an offence of money laundering under s. 4(1)(a) of the AMLATFPUAA.

**[47]** The IO AMLATFPUAA in his affidavit avers that the respondent has received, in his RHB Bank Berhad Current Account No. 21427700032720, the sum of RM1,200,000 *vide* AmIslamic Bank Bhd Cheque No. 571664 dated 3 December 2012 (exh. "MSAN10" of encl. 6). The cheque was made payable to "Sim Sai Hoon", the respondent. The cheque was issued from the first account of DSNR. The fact that the respondent did receive the sum of RM1,200,000 in his account was not disputed by the respondent in his affidavit in reply.

**[48]** The monies in DSNR's first account, either wholly or partly, are proceeds of the offence of using office or position for gratification under s. 23(1) of the MACC Act 2009 as there are ample evidence to show their remittances. DSNR's first account thus consists of "proceeds of an unlawful activity" as defined under s. 3 of the AMLATFPUAA. The sum of RM1,200,000 issued in favour of the respondent *vide* AmIslamic Bank Bhd

Cheque No. 571664 dated 3 December 2012 originated from DSNR's first account was received and remitted into the respondent's RHB Bank Bhd Current Account No. 21427700032720.

**[49]** In that sense, the transaction which involves the proceeds of an unlawful activity has been completed and the offence of money laundering under s. 4(1)(a) of the AMLATFPUAA is said to have been committed. The sum of RM1,200,000.00 is the subject matter or evidence of the offence of money laundering. The question which remains to be answered is simply this, "can the sum of RM41,261.64 and all of its accruals in the respondent's Current Account No. 21427700032720 at the RHB Bank Bhd, Salak South branch, Kuala Lumpur which was seized on 21 September 2018 be said to be the subject matter or evidence of the offence of money laundering?".

**[50]** The sum of RM1,200,000 from the first account of DSNR was remitted into the respondent's RHB Bank Bhd account *vide* AmIslamic Bank Bhd Cheque No. 571664 dated 3 December 2012 whereas as of 5 July 2016, the respondent's RHB Bank Bhd account showed a negative balance of RM21,461.26 and the freezing order was only issued on 25 June 2018. In other words, the sum of RM1,200,000 from the first account of DSNR which found its way into the respondent's RHB Bank Bhd account has been totally spent at the time when the applicant issued the freezing order and seized the respondent's RHB Bank Bhd account. Any economic advantage as argued by the learned DPP, if at all, could not have been at the disposal of the respondent when the impugned amount of money no longer resides in the respondent's RHB Bank Bhd account.

**[51]** The respondent made a positive assertion of this fact at para. 17 of the respondent's "afidavit jawapan responden" affirmed on 15 August 2019 by Sim Sai Hoon (encl. 9). However, I find that the applicant, at para. 4 of its "afidavit balasan" affirmed on 29 August 2019 by Muhammad Syazari Arif bin Nordin (encl. 11) merely made bare averments without specifically rebutting the respondent's positive assertion and a sweeping averment of his belief that the money seized from the respondent's RHB Bank Bhd account is the subject matter or evidence relating to the commission of an offence under s. 4(1)(a) of the AMLATFPUAA as distinguished from the specific averments made by the respondent and the attached statement of account showing that fact in exh. "SH1". It is trite that material averments made in an affidavit must be rebutted by the adverse party and failure to do so risks the material facts being treated as having been admitted see *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* (*supra*) and *Ng Hee Thoong & Anor v. Public Bank Bhd* (*supra*)).

**[52]** In the circumstances, I find that the relevant subject matter or evidence relating to the commission of an offence under s. 4(1)(a) of the AMLATFPUAA is no longer in the bank account of the respondent, either wholly or partly. As such, it could not be the subject of a forfeiture application and this court could not order for its forfeiture. This court before whom the application is made shall make an order of forfeiture only if it is satisfied that the seized property is the subject matter of evidence relating to the commission of the offence of money laundering see *PP v. Kuala Dimensi Sdn Bhd & Ors* [2019] 3 CLJ 650 CA; [2018] 6 MLJ 37; [2019] 6 MLRA 637; [2018] 5 AMR 789).

**[53]** The aim of s. 56(2) of the AMLATFPUAA is to forfeit the subject matter or evidence of the offence of money laundering and not just any property. The law in respect of forfeiture of properties criminalises the property instead of the person. As such, the respondent should not be made to bear the brunt when the crime has ceased to exist.

**[54]** To this end, I find that the applicant has failed in its application against the respondent on the balance of probabilities and there is no necessity for this court to further consider whether there are any claims made by any purchaser in good faith for valuable consideration in respect of the sum of RM41,261.64 in the respondent's account which was seized by the applicant.

**Conclusion**

**[55]** Based on the aforesaid reasons, I find that on the balance of probabilities the applicant has failed to show that the sum of RM41,261.64 held in the respondent's RHB Bank Bhd account is the subject matter or evidence relating to the commission of an offence under s. 4(1)(a) of the AMLATFPUAA. I hereby dismiss the applicant's application and order that all monies in the respondent's RHB Bank Bhd Account No. 21427700032720 be hereby returned to the respondent.